Supreme Court, U.S.
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Supreme Court of the United States

SHERRI KOEHNKE, PETITIONER

v.

CITY OF MCKEESPORT; E. MICHAEL ELIAS; TOM CARTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

What is the proper test for computing the date when a cause of action arises for which the statute of limitations begins to run?

TABLE OF CONTENTS

Pag

QUESTION PRESENTED .....

TABLE OF AUTHORITIES ii

OPINIONS BELOW .....

JURISDICTION .....

RELEVANT PROVISIONS INVOLVED .....

STATEMENT .....

REASONS FOR GRANTING THE PETITION .....

CONCLUSION 1

APPENDIX

Circuit Court Decision 1
District Court Decision 9
Order Denying Rehearing 1

TABLE OF AUTHORITIES

Page

CASES

ACTION OF PENNSYLVANIA V. SE. PENNSYLVANIA TRANSP. AUTH., 539 F.3D 199, 209 (3D CIR. 2008) 9
AMINI V. OBERLIN COLLEGE, 259 F.3D 493, 500 (6TH CIR. 2001) 7
CONNORS V. HALLMARK & SON COAL CO., 290 U.S. APP. D.C. 170, 935 F.2D 336, 341-42 (D.C. CIR. 1991) 10
CUPPY V. GEN. ACCIDENT FIRE & LIFE ASSURANCE CORP., 378 S.W.2D 629, 630-31 (KY. 1964) 13
FAHRNER V. SW MFG., INC., 48 S.W.3D 141, 143 (TENN. 2001) 14
FRATUS V. DELAND, 49 F.3D 673, 675 (10TH CIR. 1995) 8
GENTY V. RESOLUTION TRUST CORP., 937 F.2D 899, 919 (3D CIR. 1991) 8
HAZEL V. GENERAL MOTORS CORP., 863 F.SUPP. 435, 439 (W.D. KY. 1994) 13
HOLLANDER V. BROWN, 457 F.3D 688, 692-93 (7TH CIR. 2006) 11
HOLMIN V. TRW, INC., 330 N.J. SUPER. 30, 748 A.2D 1141, 1145 (N.J. SUPER. CT. APP. DIV. 2000) 15
HURT V. GARRISON, 1942 OK 239, 192 OKLA. 66, 133 P.2D 547, 550 (1942) 14
INDUS. CONSTRUCTORS CORP. V. UNITED STATES BUREAU OF RECLAMATION, 15 F.3D 963, 969 (10TH CIR. 1994) 8
JARVIS V. CITY OF STILLWATER, 1987 OK 5, 732 P.2D 470, 473 (OKLA. 1987) 14
KNOX COLL. V. CELOTEX CORP., 88 ILL. 2D 407, 430 N.E.2D 976, 980-81, 58 ILL. DEC. 725 (ILL. 1981) 12
KRS § 413.190(2). SEE MUNDAY V. MAYFAIR DIAGNOSTIC LAB., 831 S.W.2D 912, 914-15 13
KY. L. SUMMARY 44 (KY. 1992 13
MULLINAX V. MCELHENNEY, 817 F.2D 711, 716 (11TH CIR. 1987) 8
RIDDELL V. RIDDELL WASHINGTON CORP., 275 U.S.

APP. D.C. 362, 866 F.2D 1480, 1491 (D.C. CIR. 1989) 10
ROBERSON V. TENNESSEE, 399 F.3D 792, 794 (6TH CIR. 2005) 7
ROSENAU V. CITY OF NEW BRUNSWICK, 51 N.J. 130, 238 A.2D 169, 172 (N.J. 1968) 14, 15
RUSSO FARMS, INC. V. VINELAND BD. OF EDUC., 144 N.J. 84, 675 A.2D 1077, 1083-84 (N.J. 1996) 15
RUTLEDGE V. BOSTON WOVEN HOSE & RUBBER CO., 576 F.2D 248, 250 (9TH CIR. 1978) 11
SAMERIC CORP. V. CITY OF PHILADELPHIA, 142 F.3D 582, 599 (3D CIR. 1998) 9
SEVIER V. TURNER, 742 F.2D 262, 272-73 (6TH CIR. 1984) 12, 14
SMITH V. NIXON, 196 U.S. APP. D.C. 276, 606 F.2D 1183, 1190 (D.C. CIR. 1979) 11
SUPERIOR BANK FSB V. GOLDING, 152 ILL. 2D 480, 605 N.E.2D 514, 518, 178 ILL. DEC. 720 (ILL. 1992) 12
UNITED STATES V. KUBRICK, 444 U.S. 111, 117, 100 S. CT. 352, 62 L. ED. 2D 259 (1979) 7, 9
UNITED STATES V. LOCKE, 471 U.S. 84, 94 N. 10, 105 S.CT. 1785, 1792 N. 10, 85 L.ED.2D 64 (1985) 7
WALLACE V. KATO, 549 U.S. 384, 387, 127 S. CT. 1091, 166 L. ED. 2D 973 (2007) 3
WASHINGTON V. UNITED STATES, 769 F.2D 1436, 1438-39 (9TH CIR. 1985) 10
WILSON V. EL-DAIEF, 600 PA. 161, 964 A.2D 354, 361-62 (PA. 2009) 13

STATUTES

28 U.S.C. § 1254(1) 1
42 PA. CON. STAT § 5524(2) 2,3
42 USCS § 1983 1

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 2009 U.S. App. LEXIS 23841 (3rd Cir. October 27, 2009). The opinion of the United States District Court for the Western District of Pennsylvania is reported at 2008 U.S. Dist. LEXIS 86894 WD PA 2008).

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit, affirming the decision of the district court's Order, was handed down on October 27, 2009. A timely Petition for Rehearing was Denied on November 23, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

42 USCS § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted

unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 Pa. Con. Stat § 5524(2):

§ 5524. Two year limitation

The following actions and proceedings must be commenced within two years:

(1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.

(2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

(3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.

(4) An action for waste or trespass of real property.

(5) An action upon a statute for a civil penalty or forfeiture.

(6) An action against any officer of any government unit for the nonpayment of money or the nondelivery of property collected upon an execution or otherwise in his possession.

(7) Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise

tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter.

STATEMENT

This appeal involves the determination, by the district court, of the date upon which the statute of limitations on the Petitioner's civil rights case began to run. Because this action was filed more than two years after the date, as calculated by the district court, it held that the claims of the Petitioner were time-barred, and dismissed the Petitioner's case on that basis.

The Third Circuit has held that the length of the statute of limitations for a § 1983 claim is governed by the personal injury tort law of the state where the cause of action arose. Wallace v. Kato, 549 U.S. 384, 387, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007). The statute of limitations for a § 1983 claim arising in Pennsylvania is two years. 42 Pa. Cons. Stat. § 5524(2). The central question, in this case, is the determination of what date started the running of that two-year period.

On February 10, 1996, Tanya Kach, the daughter of the Petitioner, left the home of her father, with whom she had been living, and was not seen again, by the Petitioner, until March of 2006.[1]

Less than one year prior to the filing of this action, the Petitioner discovered that shortly after

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[1] Tanya's father waited four days to tell the Petitioner that their daughter was missing.

Tanya disappeared, members of the McKeesport Police Department had gone to the home of one Thomas Hose[2] to see if Tanya was there.[3]

She was - and she was able to hear the exchange between Hose and the officers, when he told them to go away, because he claimed that his parents were sleeping. The officers complied with his wishes, and did not return with a search warrant on that, or on any other day. Had they promptly done so, they would have found Tanya, who was a distance of only several feet from that door at the time, and the Petitioner would have been spared ten years of indescribable misery over what she thought was the death of her only child.

Upon the filing of the Amended Complaint, the Defendants filed a pleading entitled "Motion to Dismiss or, in the Alternative, Motion for Summary Judgment." In support of that Motion, they attached nineteen Exhibits that had been obtained during discovery in a related case involving Tanya. No discovery was ever conducted in the present case.

The Petitioner was forced to argue in opposition to that Motion without the benefit of having had the opportunity to conduct any discovery, a fact that was acknowledged by the District Court Judge in Footnote

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[2] Thomas Hose, a janitor in Tanya's school, was sent to prison over his involvement in this matter.

[3] The Petitioner brought this case less than one year from the date she discovered she had a valid cause of action. Because she could not have discovered this until after Tanya was found and became communicative, she could not otherwise have been reasonably appraised that her causes of action existed until that time.

1 of his Memorandum and Opinion, attached hereto as part of the Appendix.

Thus, although discovery would have shown the time and circumstances under which the Petitioner actually received the information that gave rise to her knowledge of her specific cause of action, she never had a chance to demonstrate that to the district court because of its premature entry of the Summary Judgment.

The Petitioner contends that Tanya's re-emergence, in and of itself, did not start the running of the statute of limitations in her case. There is nothing, on record, to show that Tanya was at the home of Thomas Hose the entire time she was missing. Further, because of the district court's Order, the Petitioner was deprived of the opportunity to place, on the record, the time and circumstances under which she became aware of the actions of the defendants that gave rise to her cause of action. That opportunity would have shown the district court the date on which the Petitioner's statute of limitations had really begun to run, and would have precluded the dismissal of the Petitioner's case on statute of limitations grounds.

Discovery would have borne out the first time that the Petitioner could have learned of the defendants' wrongdoing, thus giving rise to her cause of action. The reasoning of the district court, affirmed by the court of appeals, is far from correct, because discovery would have revealed that the Petitioner could never possibly have learned of her cause of action until

the time that the Amended Complaint says that sh did. [4]

In addition, had discovery been permitted, th district court would have learned that the Petitione after the "found" Tanya had come to live with her, wa advised not to inquire about what had happened at th home of Thomas Hose during her period of captivit Rather, the counselor who was treating Tanya had to the Petitioner that she would eventually learn details Tanya's time with Hose, when, and only when Tany was ready to talk about them, and not before.

Thus, the time in which the Petitioner shou have reasonably been made aware of when her cause action existed came months after the date of h daughter's re-emergence.

This Petition seeks to have the Court review t issue of when the Petitioner should reasonab discovered that her cause of action existed, and standardize the variations of the "discovery rule" th exist among the various Circuits, both on the feder and the state court levels.

REASONS FOR GRANTING THE PETITION

This Court has held that Statutes of Limitati represent "a pervasive legislative judgment that it

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[4] Paragraph 37 of the Amended Complaint avers "it was during pendency of the aforementioned other case that the Plaintiff fou out about this failure of McKeesport Police to search the home Thomas Hose less than one year prior to the filing of this acti Thus this case is timely filed." [Emphasis supplied]. This averm was never denied anywhere in the district court record.

unjust to fail to put the adversary on notice to defend within a specified period of time, and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." United States v. Kubrick, 444 U.S. 111, 117, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979).

In light of this statement, can it be said that the date that the Petitioner filed her action was "unjust" to the defendants sued by her and that her claims were stale? The answer to that question is a resounding "no."[5]

This Court has also held that statutes of limitations are subject to equitable tolling. United States v. Locke, 471 U.S. 84, 94 n. 10, 105 S.Ct. 1785, 1792 n. 10, 85 L.Ed.2d 64 (1985). Such an instance might be found to exist in the present case.

The general question that relates to this case is framed in a case decided by the Sixth Circuit, when it held that a plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence. Roberson v. Tennessee, 399 F.3d 792, 794 (6th Cir. 2005). Thus, the Sixth Circuit reasoned that a plaintiff's action accrues when he discovers that he has been injured, not when he determines that the injury was unlawful. Amini v. Oberlin College, 259 F.3d 493, 500 (6th Cir. 2001).

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[5] Indeed, the same defendants had been defending a case brought on behalf of the Petitioner's daughter, that had been brought sometime before, and that was still pending, thus making the facts relied upon by the Petitioner anything but stale.

More closely akin to the position advanced by the Petitioner, the Eleventh Circuit has held that a § 1983 claim accrues, and its statute of limitations begins to run, when "facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." Mullinax v. McElhenney, 817 F.2d 711, 716 (11th Cir. 1987). This statement appears to be in conflict with the holding of the Amini case.

The Tenth Circuit weighs in on this issue by holding that in general, under the federal discovery rule, claims accrue and '[t]he statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action.'" Indus. Constructors Corp. v. United States Bureau of Reclamation, 15 F.3d 963, 969 (10th Cir. 1994). In particular, "'[a] civil rights action accrues when facts that would support a cause of action are or should be apparent.'" Fratus v. Deland, 49 F.3d 673, 675 (10th Cir. 1995). In light of the silence of both her daughter and those she sued, there is no way that the Petitioner could have learned of the existence of her cause of action until she did – less than one year prior to the date that she filed her case.

The Third Circuit, from which this present case arises, is more restrictive than the Tenth and Eleventh Circuits. It has held that Federal law governs a cause of action's accrual date. Genty v. Resolution Trust Corp., 937 F.2d 899, 919 (3d Cir. 1991). Under federal law, a cause of action accrues, and the statute of limitations begins to run, "when the plaintiff knew or should have known of the injury upon which its action is based." Sameric Corp. v. City of Philadelphia

142 F.3d 582, 599 (3d Cir. 1998). This is more restrictive in that the plaintiff is required only to know of the injury, and not the time in which the cause of that injury has also been discovered. The conflict between circuits demonstrated by this holding should be resolved by this Court.

The Third Circuit also holds that under the discovery rule, a "cause of action accrues 'when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.'" Disabled in Action of Pennsylvania v. Se. Pennsylvania Transp. Auth., 539 F.3d 199, 209 (3d Cir. 2008) (*quoting* Romero v. Allstate Corp., 404 F.3d 212, 222 (3d Cir. 2005)). Under the injury rule, a cause of action accrues at the time of the injury.

Further, this very Court has held that as a general matter, a cause of action accrues at the time of the last event necessary to complete the tort, usually at the time the plaintiff suffers an injury. United States v. Kubrick, 444 U.S. 111, 120, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979).

The Petitioner has demonstrated that she could not have known that she had a cause of action until months after her daughter had been found, because it took that long for Tanya to open up to her mother about some of what had occurred during her period of time with Thomas Hose. It is this kind of situation that was contemplated by the Ninth Circuit, when it held, in one particular case, that that plaintiff's claim had accrued when a comatose patient died, rather than when she fell into a years-long coma, because the plaintiff was never aware of her injury or its cause. Washington v. United

States, 769 F.2d 1436, 1438-39 (9th Cir. 1985). Again this case presents a conflict with the Third Circuit's interpretation of when a cause of action accrues.

The DC Circuit's holding also conflicts with th Third Circuit when it supports the Petitioner's positio that her cause of action was not time-barred, when i pointed out that in federal courts "the general rule o accrual" in cases in which the injury is "not of the sor that can readily be discovered when it occurs" is that cause of action accrues and the limitations perio begins to run only when "the plaintiff discovers, or wit due diligence, should have discovered, the injury that the basis of the action." Connors v. Hallmark & So Coal Co., 290 U.S. App. D.C. 170, 935 F.2d 336, 341-4 (D.C. Cir. 1991).

Further, the DC Circuit held that to prevail on statute of limitations defense, a defendant must sho that the plaintiff had "something closer to actual notic than the merest inquiry notice that would be sufficien to set the statute of limitations running in a situatio untainted by fraudulent concealment." Riddell Riddell Washington Corp., 275 U.S. App. D.C. 362, 8(F.2d 1480, 1491 (D.C. Cir. 1989).

The record, in the present case, does not sho that the defendants, sued by the Petitioner, ever to her that they had gone to the home of Thomas Hos that he had sent them away, and that they had failed return with a search warrant of his premises in th hope of finding her daughter.

In such an instance, it has been held that silen does toll the statute of limitations if the defendant h

an affirmative duty to disclose the relevant information to the plaintiff. Smith v. Nixon, 196 U.S. App. D.C. 276, 606 F.2d 1183, 1190 (D.C. Cir. 1979); Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978). As such, the defendants did not satisfy the criteria set forth in the Riddell case.

Both the district court and the Third Circuit erred in their determination of when the Petitioner was, or should have been on notice, that she had a case to bring against the defendants that she had sued. In making these errors, the Petitioner, if this Petition is Denied, will never be compensated for the misery she went through, thinking her only child was dead, for ten years.

REVIEW IS NECESSARY TO RESOLVE THE CONFLICTS BETWEEN THE CIRCUITS ON THIS ISSUE

As demonstrated above, many of the Circuits have different rules as to when the statute of limitations begins to run on a cause of action. These differences filter down into various State Courts as well, shown for some in the following case instances:

In Illinois the statute of limitations for a personal-injury claim begins to run "when the plaintiff discovers, or reasonably could discover" the injury and cause. Hollander v. Brown, 457 F.3d 688, 692-93 (7th Cir. 2006).

Illinois has also recognized that courts also have a discovery rule to protect those who are unaware of their right to sue, "to encourage the trial of cases on

their merits and avoid premature summary dismissals." Superior Bank FSB v. Golding, 152 Ill. 2d 480, 605 N.E.2d 514, 518, 178 Ill. Dec. 720 (Ill. 1992). The discovery rule delays the accrual of claims until the plaintiff reasonably should know that he has been injured *and* that the injury was wrongfully caused. *Id.* A plaintiff's knowledge that his injury was wrongfully caused does not necessarily mean knowledge of actionable conduct. Knox Coll. v. Celotex Corp., 88 Ill. 2d 407, 430 N.E.2d 976, 980-81, 58 Ill. Dec. 725 (Ill. 1981). The cause of action accrues and the limitations period begins to run when "the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Id.* In addition, in Illinois, the party seeking to utilize the discovery rule bears the burden of proving the date of discovery. In the present case, the Petitioner never had the chance to do so.

In Tennessee litigation brought under federal civil rights laws, the statute of limitations begins to run when the plaintiff knows, or has reason to know through the exercise of reasonable diligence, of the injury that is the basis of his action. Sevier v. Turner, 742 F.2d 262, 272-73 (6th Cir. 1984).

The Third Circuit has held that in cases involving latent injuries or instances where the causal connection between an injury and another's conduct is not apparent, such as in the present matter, the discovery rule may "toll the statute of limitations until the plaintiff discovers, or reasonably should discover, that she has been injured and that her injury has been

caused by another party's conduct." Wilson v. El-Daief, 600 Pa. 161, 964 A.2d 354, 361-62 (Pa. 2009).

Kentucky has codified the doctrine of fraudulent concealment through the enactment of KRS § 413.190(2). *See* Munday v. Mayfair Diagnostic Lab., 831 S.W.2d 912, 914-15, 39 5 Ky. L. Summary 44 (Ky. 1992) (the statute "is simply a recognition in law of an equitable estoppel . . . to prevent fraudulent or inequitable application of a statute of limitations").

When a cause of action mentioned in KRS 413.090 to 413.160 accrues against a resident of this state, and he, by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced.KRS § 413.190(2). Once the "obstruction" is removed, a plaintiff has a duty to exercise reasonable diligence in pursuing his or her claims. *See* Cuppy v. Gen. Accident Fire & Life Assurance Corp., 378 S.W.2d 629, 630-31 (Ky. 1964). In order to establish fraudulent concealment, the defendant's action must have prevented Plaintiff from inquiring into the action, or eluded Plaintiff's investigation, or otherwise mislead the Plaintiff. Hazel v. General Motors Corp., 863 F.Supp. 435, 439 (W.D. Ky. 1994) (*citing* Burke v. Blair, 349 S.W.2d 836, 837 (Ky. 1961)). However, the plaintiff is always "under the duty to exercise reasonable care and diligence to discover whether he has a viable legal claim," and any fact that should arouse his suspicion is equivalent to "actual knowledge of his entire claim." *Id.*

A case that supports the position taken by th Petitioner comes from Tennessee, where it was he that under the discovery rule, a limitations period do not commence until "the plaintiff knows *or in t exercise of reasonable care and diligence should kn* that an injury has been sustained as a result wrongful or tortious conduct by the defendant Fahrner v. SW Mfg., Inc., 48 S.W.3d 141, 143 (Ten 2001) [Emphasis in the original]; *see also* Sevier Turner, 742 F.2d 262, 272-73 (6th Cir. 1984), which he that in Tennessee, litigation brought under federal ci rights laws, the statute of limitations begins to r when the plaintiff knows, or has reason to kn through the exercise of reasonable diligence, of t injury that is the basis of his action.

In Oklahoma, the discovery rule tolls the statu of limitations "until an injured party knows of, or in t exercise of reasonable diligence, should have known or discovered the injury, and resulting cause of acti Therefore, if defendants engage in "false, fraudulent misleading conduct" calculated to lull plaintiffs ir sitting on their rights, the limitations period may not triggered. Jarvis v. City of Stillwater, 1987 OK 5, 7 P.2d 470, 473 (Okla. 1987); *see also* Hurt v. Garris 1942 OK 239, 192 Okla. 66, 133 P.2d 547, 550 (194 holding a statute of limitations tolled during a period fraudulent concealment.

The New Jersey Supreme Court has "identif the accrual of [a] cause of action as the date on wh 'the right to institute and maintain a suit' first aros Rosenau v. City of New Brunswick, 51 N.J. 130, 2 A.2d 169, 172 (N.J. 1968). "That phrase refers to 'combination of facts or events which perm

maintenance of a lawsuit; the time of occurrence of the last of these requisite facts is thereby made the critical point of [the] inquiry.'" Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 675 A.2d 1077, 1083-84 (N.J. 1996). A cause of action will therefore be said to have accrued only at the time all of its elements have occurred. *See* Rosenau, 238 A.2d at 172-74 (explaining that a cause of action "grounded on negligent injury or damage to person or property . . . accrue[s] not when the negligence itself took place but when the consequential injury or damage occurred," and finding that plaintiffs could institute an action many years after the negligent act, the improper manufacture of a water meter, because only when the meter broke was the plaintiffs' property damaged); *see also* Holmin v. TRW, Inc., 330 N.J. Super. 30, 748 A.2d 1141, 1145 (N.J. Super. Ct. App. Div. 2000) (the plaintiff's cause of action accrued when he suffered damages from fraud, not when the fraudulent act occurred).

Thus, certiorari is warranted to resolve a split among the circuits and the states that encompass those circuits. It is time that the Supreme Court once and for all decides a case in which all circuits and all states can then have a guide to allow them to uniformly determine when a cause of action accrues, and when the statute of limitations begins to run in each instance.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully requests that the Supreme Court grant review of this matter.

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No. 08-4519

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SHERRI KOEHNKE, Appellant
v.
CITY OF MCKEESPORT; E. MICHAEL ELIAS; TOM CARTER

October 27, 2009, Submitted Under Third Circuit L.A.R. 34.1(a)

October 28, 2009, Opinion Filed

NOTICE: NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

OPINION OF THE COURT

FUENTES, *Circuit Judge:*

Appellant Sherri Koehnke appeals from the final order of the District Court, which granted Appellees' motion for summary judgment. Ms. Koehnke filed this lawsuit against the City of McKeesport (the "City") and two of its police officers, alleging that the police botched their

investigation into her daughter's disappearance and thereby violated Ms. Koehnke's constitutional rights. The District Court granted the defendants' motion for summary judgment, concluding that Ms. Koehnke's claims were time-barred. We will affirm.

I.

We write primarily for the parties, who are familiar with the background of this case, and so we review only those facts necessary to our analysis. Ms. Koehnke is the mother of Tanya Kach, who, in early 1996, resided with Ms. Koehnke's ex-husband, Jerry Kach, Jr., in McKeesport, Pennsylvania. On February 10, 1996, then-fourteen-year-old Tanya ran away from home. Unbeknownst to her parents, Tanya had developed an intimate relationship with Thomas Hose, a thirty-seven-year-old security guard at her school, and on the day she left Mr. Kach's residence, Tanya moved in with Mr. Hose and his parents without informing anyone of her whereabouts.

After Ms. Koehnke learned that her daughter had gone missing, she noticed Mr. Hose's telephone number on her telephone bill for the date when Tanya had last visited her home. Ms. Koehnke called Mr. Hose to ask him if he knew anything about Tanya's disappearance, but Mr. Hose told her that he did not know Tanya and knew nothing about her whereabouts. After Ms. Koehnke spoke with Mr. Hose, she and Mr. Koehnke visited the McKeesport Police Department, where she spoke with Officer Elias. Ms. Koehnke informed Officer Elias that Tanya was friends with Mr. Hose and that Tanya had called him from Ms. Koehnke's house before her disappearance. Ms. Koehnke also told Officer Elias

that she had called Mr. Hose to ask if he knew anything about her daughter's whereabouts, and that he denied knowing Tanya at all. Police investigators paid a visit to Mr. Hose's residence; the officers spoke with Mr. Hose but did not enter the premises because Mr. Hose told them that his parents were sleeping inside.

In 1998 or 1999, Ms. Koehnke again informed the McKeesport Police Department that she suspected that Mr. Hose was involved in Tanya's disappearance. The officer she spoke with assured her that the Department had investigated Mr. Hose and had determined that he "ha[d] nothing to do with" Tanya's disappearance. (App. 92.)

On March 21, 2006, a decade after she ran away from home, Tanya disclosed her identity to Joe Sparico, the owner of a local convenience store, and informed him of the fact that she had been living in Mr. Hose's home for the last ten years. Mr. Sparico contacted the authorities, and law enforcement officers removed Tanya from Mr. Hose's home. In the days following these events, Tanya's reappearance, and the fact that she had spent a decade living with Mr. Hose, were covered extensively by the local media, and reporters had "camped out" in front of Ms. Koehnke's house. (App. 104.) Ms. Koehnke spoke with Tanya on March 23, 2006, and was reunited with her in person the next day.

Ms. Koehnke filed this lawsuit on June 2, 2008, alleging that the City had a policy or custom of failing to train police officers in the handling of missing children cases, as well as a policy or custom of inadequately investigating citizen complaints. She asserts that the defendants violated her due process and equal

protection rights. The defendants moved for summary judgment.[1] The District Court granted the motion, concluding that the statute of limitations on Ms. Koehnke's claims expired more than two months before she filed this lawsuit. Koehnke filed this timely appeal.

II.

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 and we have jurisdiction under 28 U.S.C. § 1291. Koehnke raises two issues on appeal, one procedural and one substantive. She first asserts that the District Court abused its discretion by granting the defendants' motion for summary judgment before the parties conducted discovery. In addition, she argues that summary judgment was improvidently entered, contending that a factual dispute exists as to the timeliness of her claims. We are not persuaded by either of these arguments, which we address in turn below.

"[W]e review a claim that the district court has prematurely granted summary judgment for abuse of discretion." *Bradley v. United States*, 299 F.3d 197, 206 (3d Cir. 2002) (citation omitted). The Federal Rules of Civil Procedure expressly permit a defendant to move for summary judgment "at any time," Fed. R. Civ. P. 56(b), whether or not the parties have conducted discovery. If the non-moving party believes that its adversary's summary judgment motion is premature, that party is not without recourse. A party that "cannot present facts essential to justify its opposition" may--and, indeed, must--"show[] *by affidavit*," Fed. R. Civ. P. 56(f) (emphasis added), how evidence of such facts "would preclude summary judgment." Bradley, 299 F.3d

at 206 (citation omitted). We have been clear that "in all but the most exceptional cases, failure to comply with Rule 56(f) is fatal to a claim of insufficient discovery on appeal." *Id.*

Koehnke's failure to file a Rule 56(f) affidavit is "fatal" to her contention that the District Court's entry of summary judgment was premature, as we find no exceptional circumstances to justify her unexplained noncompliance with Rule 56(f).[2] *Id.* Indeed, while Koehnke argues that discovery would have enabled her to prove that it was not until long after Tanya reappeared that Koehnke became aware of the police's failure to search Hose's residence, we agree with the City that Koehnke did not need to conduct discovery in order to adduce evidence of what she knew and when she knew it. We find no abuse of discretion in the timing of the District Court's entry of summary judgment.

We further conclude that the District Court correctly determined that Ms. Koehnke's claims are time-barred.[3] Claims brought pursuant to 42 U.S.C. § 1983 are subject to the statute of limitations "which the State provides for personal-injury torts," *Wallace v. Kato*, 549 U.S. 384, 387, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007), which in Pennsylvania is two years. *See* 42 Pa. Con. Stat. Ann. § 5524. Ordinarily, a section 1983 claim accrues at the time when the injury is sustained–that is, "when the plaintiff has a complete and present cause of action." *Wallace*, 549 U.S. at 388 (internal quotations and citations omitted).

However, under Pennsylvania's discovery rule, the accrual of the statute of limitations may be tolled "for

situations in which a party, through no fault of . . . her own, does not discover her injury until after the statute of limitations normally would have run." *Debiec v. Cabot Corp.*, 352 F.3d 117, 129 (3d Cir. 2003). As we have explained:

> For the statute of limitations to run, a plaintiff need not know the exact nature of his injury, as long as it objectively appears that the plaintiff is reasonably charged with the knowledge that he has an injury caused by another . . . . Moreover, the plaintiff attempting to apply the discovery rule bears the burden of demonstrating that he exercised reasonable diligence in determining the existence and cause of his injury. To demonstrate reasonable diligence, a plaintiff must establish that he pursued the cause of his injury with those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others.

Mest v. Cabot Corp., 449 F.3d 502, 510-11 (3d Cir. 2006) (internal quotations and citations omitted).

We agree with the District Court that Koehnke's claims are time barred. The record shows that as of March 24, 2006 at the latest, Koehnke knew (or had every reason to know) (1) that she had informed the Police Department of the basis of her suspicions concerning Hose, (2) that the Department had assured her that it had investigated Hose and determined that he had nothing to do with Tanya's disappearance, and (3) that the Department's determination was erroneous. To the

extent that Koehnke sustained a constitutional injury as a result of the allegedly inadequate investigation, she had, by March 24, 2006, "sufficient critical facts to put [her] on notice that a wrong has been committed and that [she] need[ed] investigate to determine whether [she was] entitled to redress." *Debiec*, 352 F.3d at 129 (citation omitted). Koehnke, who "bears the burden of demonstrating that [s]he exercised reasonable diligence in determining the existence and cause of [her] injury," *Mest*, 449 F.3d at 511, identified no evidence from which a jury might conclude that she exercised such diligence, as the District Court determined.

In sum, we agree with the District Court that the statute of limitations on Koehnke's claims expired on March 24, 2008, more than two months before Koehnke filed her complaint. We will thus affirm the District Court's summary judgment order.

III.

For the foregoing reasons, we will affirm the District Court's grant of summary judgment.

Footnotes

1 Defendants styled their motion as one seeking dismissal or summary judgment. Because Defendants submitted documentary evidence in support of their motion, and because Ms. Koehnke submitted evidence in opposition thereto, the District Court properly treated the motion as a motion for summary judgment.

2 Although the brief Koehnke submitted to the District Court noted in passing that the parties had not

conducted discovery, we have made clear that an "attorney's unverified memorandum opposing the motion for summary judgment" cannot substitute for a Rule 56(f) affidavit. *Radich v. Goode*, 886 F.2d 1391, 1394 (3d Cir. 1989).

3We review a district court's order granting summary judgment *de novo*. *See Antonelli v. New Jersey*, 419 F.3d 267, 272 (3d Cir. 2005). Summary judgment is appropriate if, viewing the record in the light most favorable to the non-movant, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)

Civil Action No. 08-0759

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

SHERRI KOEHNKE, Plaintiff,

v.

The CITY OF MCKEESPORT, E. MICHAEL ELIAS, Individually and as an Agent and Employee Thereof, and TOM CARTER, Individually and as an Agent and Employee Thereof, Defendants.

2008 U.S. Dist. LEXIS 86894

October 24, 2008, Decided
October 27, 2008, Filed

MEMORANDUM and ORDER

Gary L. Lancaster

District Judge.

This is an action in civil rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Plaintiff, Sherri Koehnke, alleges that defendants, the City of McKeesport, and McKeesport police officers E. Michael Elias and Tom Carter, violated her substantive due process and equal protection rights under the Fourteenth Amendment to the United States Constitution [doc. no. 1]. Plaintiff also alleges a state law claim of intentional infliction of emotional distress. The suit stems from defendants'

failure to successfully investigate plaintiff's daughter's ten year disappearance.

Defendants have filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b) (6), or, in the alternative, for summary judgment pursuant to Fed.R.Civ.P. 56(c) [doc. no. 6]. The defendants argue, among other things, that plaintiff's claims against them are barred by the applicable statute of limitations. For the reasons set forth below, the motion for summary judgment will be granted.

I. *BACKGROUND*

The following material facts are not in dispute. [1]

Plaintiff is the mother of Tanya Kach. In February of 1996, fourteen year old Tanya ran away from her home in McKeesport, Pennsylvania where she lived with her father and his girlfriend. Without telling anyone of her plans or her whereabouts, Tanya moved in with Thomas Hose and his mother and father, who also lived in McKeesport, Pennsylvania. At the time, Thomas Hose was a thirty-seven year old security guard at Tanya's school. After plaintiff learned that Tanya was missing, she noticed Thomas Hose's phone number listed on her telephone bill for the date Tanya had last visited her shortly before she ran away. Plaintiff called Thomas Hose and asked whether he knew of Tanya's whereabouts. Thomas Hose told her that did not know Tanya and did not know that she was missing.

Thereafter, plaintiff met with defendant Elias about Tanya's disappearance. At that time, defendant Elias was the Juvenile Lieutenant for the McKeesport police. Plaintiff told defendant Elias that Tanya was friends

with Thomas Hose and that Tanya had called him from her house shortly before she ran away. Plaintiff also told defendant Elias that she had called Thomas Hose after learning that Tanya was missing, and that Thomas Hose denied even knowing Tanya.

In August of 1998 or September of 1999, plaintiff met with another member of the McKeesport police, Captain of Detectives Eugene Riazzi. Plaintiff told Captain Riazzi of her suspicion that Thomas Hose was involved in Tanya's disappearance. Capatain Riazzi told her that the McKeesport police had investigated Thomas Hose and concluded that Thomas Hose had nothing to do with Tanya's disappearance.

On March 21, 2006, Tanya finally revealed her true identity to friends. One of those friends called the authorities. Thereafter, law enforcement officials came to the Hose residence and removed Tanya. By March 23, 2006, there was widespread media coverage of Tanya's re-appearance and the fact that she had been living with Thomas Hose and his family for ten years. On March 23, 2006, plaintiff spoke to Tanya, as well as the media. On March 24, 2006, plaintiff saw Tanya in person. [2]

Plaintiff filed this action on June 2, 2008. According to plaintiff, approximately one year prior to filing the complaint, plaintiff learned for the first time that McKeesport police went to the Hose home to look for Tanya a few years after her disappearance. [3] During this incident, Thomas Hose told police that Tanya was not there and that his parents were sleeping. The police then abandoned their search, allowing Tanya to remain in the Hose household.

In her complaint, plaintiff alleges that defendant City of McKeeport violated her Fourteenth Amendment substantive due process rights by: (1) having a policy or custom of failing to adequately train and supervise police officers in lost juvenile matters; and (2) having a policy or custom of inadequate response to, and investigation of, citizen complaints. Thereby, according to plaintiff, the City allowed Constitutional abuses to occur. Plaintiff claims the defendant police officers violated her Fourteenth Amendment substantive due process rights and equal protection rights by failing to use professional police procedures to investigate Tanya's disappearance. Plaintiff also asserts a state law claim of intentional infliction of emotional distress.

For the reasons discussed below, plaintiff's claims are untimely.

II. *STANDARD OF REVIEW*

Fed.R.Civ.P. 56(c) provides that summary judgment may be granted if, drawing all inferences in favor of the non-moving party, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The mere existence of some factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (internal quotation marks omitted). Similarly, summary judgment is improper so long as the dispute over the material facts is genuine. *Id.* In determining whether the dispute is genuine, the

court's function is not to weigh the evidence or to determine the truth of the matter, but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 248-49.

It is on this standard that the court has reviewed the instant motion for summary judgment and the response thereto.

III. *DISCUSSION*

In order to recover in a section 1983 action, a plaintiff must prove two essential elements: (1) defendants deprived her of a right secured by the Constitution or laws of the United States; and (2) defendants deprived her of this federal right under color of any statute, ordinance, regulation, custom, or usage of any State or Territory. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). Section 1983 does not create substantive rights. It only allows a plaintiff to recover damages for violations of rights protected by other federal laws or by the United States Constitution. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284-85, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002); *Wilson v. Garcia*, 471 U.S. 261, 278, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985).

The defendants contend that plaintiff's section 1983 claims expired pursuant to the applicable statute of limitations before she filed her complaint. Plaintiff, however, argues that her claims are not time barred because she did not discover that she had a claim until she learned that the McKeesport police went to the Hose residence a few years after Tanya disappeared but failed to discover Tanya. She contends that she did

not learn of this incident until, "a little less than one year prior to the filing of this case." [Doc. No. 10 at 7]. Therefore, according to plaintiff, the claim is timely. The court agrees with defendants.

A. *Statute of Limitations*

The applicable statute of limitations for a section 1983 claim is the general personal injury limitations period of the forum state. *Wilson*, 471 U.S. at 279-80. The statute of limitations for personal injury claims in Pennsylvania is two years. *See* Pa. Cons. Stat. Ann. § 5524(2) (2007). Therefore, the applicable statute of limitations for plaintiff's section 1983 claims is two years from the date her section 1983 claims accrued. *Bougher v. Univ. of Pittsburgh*, 882 F.2d 74, 78 (3d Cir. 1989).

Generally, the statute of limitations for a tort action under Pennsylvania law accrues when the injury is sustained. *Debiec v. Cabot Corp.*, 352 F.3d 117, 128-29 (3d Cir. 2003). In this case, plaintiff's claimed injury is the constitutionally protected right to the companionship of her daughter. Plaintiff's injury, therefore, was sustained beginning in February 1996 and continued until, at the latest, March 24, 2006 when she saw Tanya again.

B. *Discovery Rule*

The "discovery rule" is an exception to the general rule discussed above. It applies where a party, through no fault of her own, does not discover her injury until after the statute of limitations would normally have run. *Moyer v. United Dominion Indus., Inc.*, 473 F.3d 532, 547 (3d Cir. 2007) (citing *Debiec*, 352 F.3d at 129). "In that case, the limitations period begins to run when the

plaintiff knows, or reasonably should know: (1) that [she] has been injured, and (2) that [her] injury has been caused by another party's conduct." *Id.* (citation and internal quotations omitted).

The party claiming the benefit of the discovery rule has the burden of demonstrating that it applies, and must establish reasonable diligence in investigating her potential claim, with "reasonableness" considered under an objective standard. *Id.* Thus, the limitations period is triggered when the plaintiff possessed sufficient critical facts to put her on notice that a wrong had been committed and that she needed to investigate to determine whether she was entitled to redress. *Id.* at 547-48 (citation and internal quotations omitted). "The issue of reasonable diligence is usually for the jury to decide, but where the facts are so clear that reasonable minds cannot differ, the commencement period may be determined as a matter of law." *Id.*

Plaintiff claims the benefit of the discovery rule in this case. Although we find that the rule applies, we conclude that it cannot save plaintiff's claims. The undisputed material facts establish that plaintiff was aware, no later than March 24, 2006, of the facts supporting her Constitutional claims. By that date, plaintiff knew that: (1) Tanya had been living with Thomas Hose and his family for the last ten years; (2) the McKeesport police knew that Tanya was friends with Thomas Hose and had called Thomas Hose from plaintiff's home shortly before Tanya disappeared; yet, Thomas Hose denied even knowing Tanya; (3) McKeesport police investigated Thomas Hose and his possible involvement in Tanya's disappearance, but concluded that he had nothing to do with Tanya's disappearance; and (4) defendants were wrong about

Thomas Hose and had obviously failed to adequately investigate him.

Plaintiff contends that the statute of limitations period should not be triggered under the discovery rule until sometime in 2007, when she learned that McKeesport police visited the Hose house, a few years after Tanya disappeared, but failed to find Tanya. This incident is certainly strong evidence of the inadequacy of defendants' investigation of Thomas Hose. However, plaintiff knew well before she learned of that incident that the McKeesport police had botched the investigation. On the day plaintiff learned that Tanya had been living with Thomas Hose and his family, plaintiff knew, or reasonably should have known, that defendants' investigation of Thomas Hose was inadequate.

We conclude as a matter of law that a reasonable person armed with the same information that plaintiff possessed on March 24, 2006, would have sufficient notice that a wrong had been committed by the defendants and that she needed to investigate to determine whether she was entitled to redress. Thus, under the discovery rule, the limitations period began to run on that date. Plaintiff's section 1983 claims, therefore, expired two years later on March 24, 2008. Because she did not file this complaint until June 2, 2008, it is time barred.

Plaintiff's state law claim of intentional infliction of emotional distress is also untimely. This claim is also subject to a two year statute of limitations. *See* 42 Pa. Cons. Stat. Ann. § 5524(7) (2007). For the same reasons set forth above, plaintiff's claim for intentional infliction

of emotional distress also accrued on March 24, 2006 and expired on March 24, 2008.

IV. *CONCLUSION*

Because resolution of the timeliness issue disposes of all of plaintiff's claims against the defendants, we will not address the defendants' additional defenses. For the reasons set forth above, the defendants' motion for summary judgment will be granted. An appropriate order follows.

ORDER

AND NOW, this 24th day of October, 2008, IT IS HEREBY ORDERED that the motion for summary judgment filed on behalf of defendants the City of McKeesport, Tom Carter, and E. Michael Elias [doc. no. 6] is GRANTED. Plaintiff's claims against all defendants are dismissed with prejudice.

IT IS FURTHER ORDERED THAT the Clerk of Court is directed to mark this case closed forthwith.

BY THE COURT:

/s/ Gary L. Lancaster, J.

Footnotes

1 At oral argument, plaintiff's counsel argued that defendants' motion was premature because the parties had not yet conducted discovery. However, the facts material to the issue of whether plaintiff's claims are time barred are not in dispute. Plaintiff has admitted the facts which are material to the issue of timeliness set forth in defendant's Statement of Undisputed Facts

[doc. nos. 8, 12]. Discovery cannot change plaintiff's own admissions.

2 On September 19, 2006, Tanya filed her own civil rights lawsuit against these defendants and others for, *inter alia*, failing to properly investigate her disappearance. That claim was dismissed as untimely. *See Kach v. Hose*, 06-1216, 2008 U.S. Dist. LEXIS 97592, 2008 WL 4279799 (W.D. Pa. Sept. 12, 2008).

3 Plaintiff is uncertain as to the exact date the police went to the Hose house. However, the exact date of this visit is not relevant for purposes of resolving this motion.

Dated: 11/23/2009
No. 08-4519
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SHERRI KOEHNKE, Appellant
v.
CITY OF MCKEESPORT; E. MICHAEL ELIAS;
TOM CARTER

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN, Circuit Judges

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

Supreme Court U S
MAR 29 2010
OFFICE OF THE CLERK

No. 09-1030

In The Supreme Court of the United States

SHERRI KOEHNKE,

Petitioner,

vs.

CITY OF McKEESPORT; E. MICHAEL ELIAS, Individually and as an Agent and Employee Thereof; and TOM CARTER, Individually and as an Agent and Employee Thereof,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS, CITY OF McKEESPORT, E. MICHAEL ELIAS AND TOM CARTER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

COUNTER-STATEMENT OF THE FACTS 1

ARGUMENT 5

A. The Petition for Writ of Certiorari is based upon an Incorrect Premise – the Third Circuit's Decision was based upon an Application of Pennsylvania State Law Relating to the Tolling of the Statute of Limitations not, as Petitioner Contends, on the Application of Federal Law on when a Federal Cause of Action Accrues 5

B. Petitioner is Essentially Asking this Court to Adopt a Federal Common Law Statute of Limitations for Section 1983 Claims and to Over-Rule the Well-Settled Principle that the Statute of Limitations for these Causes of Action are Governed by State Law 7

C. The Third Circuit Properly Determined that Petitioner was not Entitled to a Tolling of the Statute of Limitations under Pennsylvania State Law because She had Failed to Exercise Reasonable Diligence 8

D. The District Court's Entry of Summary Judgment was not Premature because Petitioner Failed to Comply with Federal Rule of Civil Procedure 56(f) 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Wallace v. Kato, 549 U.S. 384, 127 S. Ct. 1091, 166 L.Ed.2d 973 (2007) 5, 7, 8

STATUTES

42 U.S.C. §1983 ..... *passim*

RULES

Fed.R.Civ.P. 56(f) 10, 11

INTRODUCTION

This is a civil rights action which was filed with the United States District Court for the Western District of Pennsylvania. This case was related to another suit styled *Tanya Nicole Kach v. Thomas Hose, et al.*, that was also pending before the District Court. In *Kach*, Tanya Kach alleged, *inter alia*, that the City of McKeesport, E. Michael Elias and Tom Carter, in his capacity as Chief of the McKeesport Police (collectively referred to as the "City of McKeesport Defendants"), supposedly violated her constitutional rights when they purportedly failed to investigate her disappearance properly and rescue her after she ran away from home and went to live with a school security guard by the name of Thomas Hose. In this case, Petitioner[1] – who is Tanya Kach's mother – claims that the alleged conduct of the City of McKeesport Defendants purportedly violated Petitioner's constitutional rights, as well.

COUNTER-STATEMENT OF THE FACTS

Petitioner fails to set out the factual background which led the District Court and the United States

[1] While this Petition was filed *pro se*, Petitioner was represented by counsel during the proceedings which took place before the District Court. Petitioner's counsel was subsequently disbarred (for reasons unrelated to this matter), but the United States Court of Appeals for the Third Circuit allowed him to continue representing Petitioner during the course of the appeal.

Court of Appeals for the Third Circuit to conclude that her claims were barred by the statute of limitations.

As noted above, Petitioner is the mother of Tanya Kach. *See* Opinion dated October 28, 2009, p. 2a.[2] In early 1996, Tanya Kach lived with Petitioner's ex-husband, Jerry Kach, Jr., in McKeesport, Pennsylvania. *Id.* On February 10, 1996, Tanya Kach ran away from home. *Id.* Unbeknownst to her parents, Tanya Kach had developed a relationship with Thomas Hose. *Id.* On the day that she ran away from home, Tanya Kach moved in with Thomas Hose without informing anyone of her whereabouts. *Id.*

After Petitioner learned that her daughter was missing, she noticed Thomas Hose's telephone number on a telephone bill for the date when Tanya Kach had last visited her home.[3] *Id.* Petitioner called Thomas Hose to ask him if he knew anything about her daughter's whereabouts. *Id.* After Petitioner spoke to Thomas Hose, she and her husband visited the McKeesport Police Department, where she spoke to Officer Elias. *Id.* Petitioner informed Officer Elias

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[2] The opinions issued by the Third Circuit and District Court are attached to the Petition for Writ of Certiorari. The City of McKeesport Defendants refer to these opinions in setting forth the procedural and factual background for this case.

[3] Petitioner and her husband were deposed during the *Kach* case. The City of McKeesport Defendants referenced this deposition testimony in the Motion to Dismiss, or in the alternative, Motion for Summary Judgment that was filed with the District Court.

that Tanya Kach was friends with Thomas Hose and that she had called him before her disappearance. *Id.* Petitioner also told Officer Elias that she had called Thomas Hose and that he had denied knowing her daughter. *See* Opinion dated October 28, 2009, pp. 2a-3a. The police went to Thomas Hose's house and spoke to him but did not enter the residence because Thomas Hose told them that his parents were sleeping. *See* Opinion dated October 28, 2009, p. 3a.

In 1998 or 1999, Petitioner again informed the McKeesport Police Department that she suspected that Thomas Hose was involved in her daughter's disappearance. *Id.* The officer to whom she spoke informed Petitioner that the department had investigated Thomas Hose and determined that he had nothing to do with Tanya Kach's disappearance. *Id.*

On March 21, 2006, Tanya Kach disclosed her identity to the owner of a local convenience store and told him that she had been living with Thomas Hose for the last ten years. *Id.* The owner of the store contacted the authorities, and law enforcement officers removed Tanya Kach from Thomas Hose's house. *Id.* In the days following these events, Tanya Kach's reappearance and the fact that she had spent the last decade living with Thomas Hose were covered extensively in the media and reporters had "camped out" in front of Petitioner's house. *Id.* Petitioner spoke with Tanya Kach on March 23, 2006, and saw her in person the next day. *Id.*

Petitioner filed a Complaint against the City of McKeesport Defendants on June 2, 2008. *Id.* The City of McKeesport Defendants filed a Motion to Dismiss or, in the alternative, Motion for Summary Judgment. *See* Memorandum and Order dated October 24, 2008, p. 10a. In said Motion, the City of McKeesport Defendants argued that, *inter alia*, Petitioner's claims were barred by the statute of limitations. *Id.*

By Memorandum Opinion and Order dated October 24, 2008, the District Court held that Petitioner's claims were barred by the statute of limitations, granted the City of McKeesport Defendants' Motion for Summary Judgment and dismissed Petitioner's claims with prejudice. *See* Memorandum and Order dated October 24, 2008, pp. 9a-18a. This determination was subsequently affirmed by the Third Circuit in an unpublished opinion issued on October 28, 2009. *See* Opinion dated October 28, 2009, pp. 1a-8a. Petitioner's Petition for Rehearing *En Banc* was denied by Order dated November 23, 2009. *See* Order dated November 23, 2009, p. 19a.

ARGUMENT

A. The Petition for Writ of Certiorari is based upon an Incorrect Premise – the Third Circuit's Decision was based upon an Application of Pennsylvania State Law Relating to the Tolling of the Statute of Limitations not, as Petitioner Contends, on the Application of Federal Law on when a Federal Cause of Action Accrues.

Petitioner contends that the Third Circuit's decision supposedly conflicts with determinations issued by other Circuits regarding when a cause of action accrues. *See* Petition for Writ of Certiorari, pp. 7-11. However, neither the Third Circuit nor the District Court, for that matter, based any analysis on when Petitioner's Section 1983 cause of action accrued.

In arriving at its determination that the District Court did not err in concluding that Petitioner's claims were barred by the statute of limitations, the Third Circuit correctly noted that this Court had held in *Wallace v. Kato*, 549 U.S. 384, 127 S. Ct. 1091, 166 L.Ed.2d 973 (2007), that claims brought pursuant to 42 U.S.C. §1983 are subject to the statute of limitations which the state provides for personal-injury torts which in Pennsylvania is two years. *See* Opinion dated October 28, 2009, p. 5a. Citing again to *Wallace*, the Third Circuit went on to state that a Section 1983 claim ordinarily accrues at the time when the injury is sustained – i.e. when the plaintiff has a complete and present cause of action. *Id.* However, the Third Circuit's decision was not based upon when

Petitioner's cause of action accrued. Rather, the Third Circuit (and the District Court) examined whether the statute of limitations should be tolled under Pennsylvania's discovery rule. *See* Opinion dated October 28, 2009, pp. 5a-7a and Memorandum and Order of Court dated October 24, 2008, pp. 14a-16a. Both courts determined that Petitioner was not entitled to tolling under Pennsylvania law because she did not use reasonable diligence in investigating her potential claim. *Id.*

In light of the above, the Petition for Writ of Certiorari should be denied because it is based upon the incorrect premise that the Third Circuit's decision was founded upon an analysis of when Petitioner's Section 1983 cause of action accrued.

To the extent that the opinions cited in the Petition for Writ of Certiorari reveal disagreement among the Circuits regarding when a federal cause of action accrues, any such dispute should have no bearing upon the Court's disposition of this Petition because when Petitioner's Section 1983 cause of action accrued had no bearing upon the Third Circuit's (or the District Court's) determination that Petitioner's claims were barred by the statute of limitations. Rather, the Third Circuit's (and District Court's) decision was based solely on the application of Pennsylvania state law on tolling.

B. Petitioner is Essentially Asking this Court to Adopt a Federal Common Law Statute of Limitations for Section 1983 Claims and to Over-Rule the Well-Settled Principle that the Statute of Limitations for these Causes of Action are Governed by State Law.

It is well-established that because Congress did not specify the time for bringing a Section 1983 claim, the courts are to look to the statute of limitations which the states have adopted for initiating a personal injury cause of action. *See Wallace*, 549 U.S. at 388, 127 S. Ct. at 1094. This Petition for Writ of Certiorari is nothing more than an attempt to have this Court over-rule this well-settled precedent in favor of the establishment of a federal statute of limitations for all Section 1983 claims.

As an initial matter, the City of McKeesport Defendants respectfully submit that if Petitioner wishes to establish a uniform statute of limitations for civil rights actions, she should approach Congress, not this Court.

Moreover, this Court has already made the policy choice that because Congress did not address questions relating to the length of the statute of limitations and tolling when it enacted Section 1983, these issues are to be governed by state law. To the extent that reference to state law results in differences between how the statute of limitations might be applied depending upon the state in which the action is brought, the City of McKeesport Defendants submit

that this was a necessary corollary of this Court's determination that state law would govern certain aspects of the statute of limitations. Petitioner does not explain why this choice was unwise or is in need of reconsideration.

C. The Third Circuit Properly Determined that Petitioner was not Entitled to a Tolling of the Statute of Limitations under Pennsylvania State Law because She had Failed to Exercise Reasonable Diligence.

As this Court stated in *Wallace*, while questions regarding when a Section 1983 action accrues is governed by federal law, state law determines whether the statute of limitations should be tolled. *Wallace*, 549 U.S. at 388, 394, 127 S. Ct. at 1095, 1098. As such, the Third Circuit properly looked to Pennsylvania state law to determine whether tolling was appropriate in this case. The City of McKeesport Defendants respectfully submit that it is not within the province of this Court (or any federal court) to question the wisdom of or to alter the substance of state law. Rather, the federal courts must take the state law as they find it and apply that law to the facts of the particular case.

The Third Circuit stated that under Pennsylvania's discovery rule, the statute of limitations may be tolled for situations in which a party, through no fault of his or her own, does not discover their injury

until after the statute of limitations normally would have run. *See* Opinion dated October 28, 2009, pp. 5a-6a. According to the Third Circuit, a plaintiff who is attempting to take advantage of the discovery rule has the burden of demonstrating that he or she exercised reasonable diligence in determining the existence and cause of his or her injury. *See* Opinion dated October 28, 2009, p. 6a. To demonstrate reasonable diligence, a plaintiff must establish that he or she pursued the cause of his or her injury with those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others. *Id.*

Applying the foregoing principles to this case, the Third Circuit noted that the record showed that as of March 24, 2006, at the latest, Petitioner knew (or had every reason to know): 1) that she had informed the Police Department of the basis for her suspicions concerning Thomas Hose; 2) that the Department had assured her that it had investigated Thomas Hose and determined that he had nothing to do with Tanya Kach's disappearance and 3) that the Department's determination was erroneous. *Id.* The Third Circuit held that to the extent that Petitioner sustained a constitutional injury as a result of the allegedly inadequate investigation conducted by the police, she had, by March 24, 2006, sufficient critical facts to put her on notice that a wrong had been committed and that she needed to investigate to determine whether

she was entitled to relief. *See* Opinion dated October 28, 2009, pp. 6a-7a. Based upon this, the Third Circuit concluded that Petitioner had identified no evidence from which a jury could conclude that she exercised reasonable diligence and that the District Court had not erred in determining that the statute of limitations had expired on March 24, 2008, more than two months before Petitioner filed her Complaint. *Id.*

D. The District Court's Entry of Summary Judgment was not Premature because Petitioner Failed to Comply with Federal Rule of Civil Procedure 56(f).

The Petition for Writ of Certiorari is replete with claims that the District Court failed to provide Petitioner with the opportunity to conduct discovery before entering judgment in favor of the City of McKeesport Defendants.

What Petitioner fails to acknowledge, though, is that the Third Circuit held that if a party is claiming that a motion for summary judgment is premature and that he or she cannot present facts essential to justify that party's opposition to the motion, Federal Rule of Civil Procedure 56(f) requires that party to submit an affidavit demonstrating how evidence of such facts would preclude summary judgment. *See* Opinion dated October 28, 2009, p. 4a. The Third Circuit also held that in all but the most exceptional cases, the failure to comply with Rule 56(f) is fatal

to a claim of insufficient discovery on appeal. *See* Opinion dated October 28, 2009, p. 5a. The Third Circuit then noted that Petitioner had failed to file a Rule 56(f) affidavit, that this failure was fatal to her contention that the District Court's entry of summary judgment was premature and that there were no exceptional circumstances to justify her unexplained noncompliance with Rule 56(f). *Id.* The Third Circuit also noted that Petitioner did not need to conduct discovery in order to obtain evidence regarding what she knew and when she knew it. *Id.*

Petitioner does not claim that the Third Circuit's application of Federal Rule of Civil Procedure 56(f) is at odds with the manner in which it has been applied by this Court or other United States courts of appeals or that the interpretation of this rule presents a matter of first impression.

CONCLUSION

For all of the reasons set forth above, Respondents, the City of McKeesport, E. Michael Elias and Tom Carter, respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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